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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 128.

THE UNION NATIONAL BANK OF SAINT LOUIS, THOMAS K. SKINKER, GEORGE I. DAVIS, ASSIGNEE OF STERLING PRICE, AND WILLIAM M. LADD, PLAINTIFFS IN ERROR,

vs.

ELIZABETH A. MATTHEWS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 14, 1876.

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1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, on the third day of October, in the year of our Lord one thousand eight hundred and seventy-four, there was filed in the office of the clerk of the supreme court, held at S't Louis, of the State of Missouri, a transcript in a cause wherein Elizabeth A. Mathews was plaintiff and Thomas K. Skinker and the Union National Bank of S't Louis were defendants in a writ of error from the circuit court of S't Louis County, wherein the said defendants were plaintiffs in error; said transcript and the proceedings in said cause in said supreme court were in words and figures following, to wit:

Writ of error.

THE STATE OF MISSOURI, *ss:*

The State of Missouri to the honorable the judges of the eighth judicial circuit in said State, greeting:

Whereas, in the record and proceedings in a certain cause lately pending in the S't Louis circuit court wherein Elizabeth Mathews was plaintiff and the The Union National Bank et al. were defendants in a civil action, manifest error hath intervened, to the great damage of said defendants, as by its complaint we are informed: Now, being willing that the error, if any there be, should be corrected and full and speedy justice done to the parties aforesaid in that behalf, command you that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said court, so that we may have them before us at our supreme court, to be begun and held in the city of S't Louis, in the county of S't Louis, in said State, on the third Monday in October next, so that the judges of our said supreme court, on inspecting the record and proceedings aforesaid, may cause to be further done therein for correcting the error what of right and according to law ought to be done.

Witness Josiah Thornburgh, clerk of our said supreme court, with the seal thereof hereunto affixed, at office in the city of S't Louis, the third day of July, in the year of our Lord one thousand eight hun-

2 dred and seventy-four.

[SEAL.] J. THORNBURGH, *Clerk*,
Pr. J. F. BAIER, *D. C.*

STATE OF MISSOURI,
County of S't Louis, ss:

I, John Lewis, clerk of the circuit court of S't Louis County, within and for the county aforesaid, in obedience to the mandate of the within writ, herewith transmit to the honorable supreme court of the State of Missouri, held at S't Louis, a full, true, and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remain of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of S't Louis, this 27th day of August, 1874.

[SEAL.] JOHN LEWIS, *Clerk.*

Transcript.

STATE OF MISSOURI,
County of S't Louis, ss:

Be it remembered that, on the ninth day of February, eighteen hun-

dred and seventy-four, there was filed in the office of the clerk of the circuit court of S't Louis County a petition which is in the words and figures following, to wit:

Petition.

ELIZABETH A. MATHEWS, PLAINTIFF,
vs.
THOMAS K. SKINKER, THE UNION NATIONAL Bank of S't Louis, and George I. Davis, assignee of Celsus Price & William M. Ladd, composing the firm of Sterling Price & Co., defendants. } Injunction.

In the circuit court of S't Louis County, April term, 1874.

Plaintiff states that the Union National Bank of S't Louis, defendant, is a corporation duly organized under the laws of the United States, and can sue and be sued, plead & be impleaded. That on the first day of March, 1871, she and Hugh B. Logan executed & delivered their joint and several note, payable to the order of Sterling Price & Co., a firm composed of Celsus Price & William M. Ladd, for the sum of fifteen thousand dollars, two years after the date thereof,
3 with interest from date at the rate of ten per cent. per annum.

That although it appears from the face of said note that this plaintiff is one of the makers thereof, in truth & in fact she was only surety for said Logan, and signed & executed said note at his special instance and request, and did not receive any consideration therefor; all of which the said Sterling Price & Co. and the said Union National Bank well knew at the time said note was so signed and executed.

Plaintiff further states that to secure the payment of said note she executed her deed of trust, dated March 1st, 1871, & recorded in the office of the recorder of deeds for S't Charles Co., Mo., Book , pages 510, 511, 512, & 513, upon the following-described real estate, lying and being in the county of S't Charles & State of Missouri, to wit, certain lands, being the west half of section thirty (30) and part of the southwest quarter of section nineteen (19) in range No. 2 east; also, part of the southeast quarter of section twenty-five (25), range one (1) east, all in township forty-seven north, beginning at the quarter-section corner on the range line between section twenty-five (25), range one (1) east, & section thirty (30), range two (2) east, a rock at corner from which a white oak eighteen inches in diameter bears S. 18 degrees W., distant 30 links, and a white oak 18 inches in diameter bears N. 75 degrees west, distant 18 links; thence west twenty-one $\frac{69}{100}$ chains to a stake from which a hickory bears S. 36 degrees W. 7 links distant; thence S. 2 degrees 10 minutes W. five $\frac{75}{100}$ chains to the middle of Perruque Creek; thence up the middle of said creek & with the meander thereof nearly as follows: West four chains, S. 2 degrees 10 minutes W. two chains, S. 18 degrees W. three chains, S. 4 degrees W. four $\frac{30}{100}$ chains to a stake in the south bank of said creek; thence S. 2 degrees 10 minutes W. twenty-seven $\frac{50}{100}$ chains to a rock in the section-line between sections 25 and 36, T. 47, R. 1; thence east along & with said line twenty-seven $\frac{10}{100}$ chains to the aforesaid range-line at corner of sections 25 & 36; thence S. 2 degrees 10 minutes W. seventy links to the cor-
4 ner of sections 30 and 31, T. 47, R. 2 east; thence east along and with the section-line between sections 30 and 31 aforesaid (at

27 $\frac{50}{100}$ chains cross Perrique Creek) at thirty-nine $\frac{85}{100}$ chains one quarter corner sections 30 and 31; thence north ninety-three $\frac{35}{100}$ to south side of the North Missouri Railroad; thence westerly along & with the south boundary of said railroad twenty-two $\frac{95}{100}$ chains to George S. Myers' northeast corner; thence S. 13 $\frac{35}{100}$ chains to a stake; thence west 12 $\frac{50}{100}$ chains in range-line George S. Myers' southeast corner; thence S. 2 degrees 10 minutes W. along & with said range-line thirty-six $\frac{84}{100}$ chains to the place of beginning, containing four hundred & twenty-three acres and three-hundredths of an acre, more or less; also, the northwest quarter of the northeast quarter of section number thirty (30), containing forty acres; also, all that portion of the northeast quarter of section number nineteen (19), lying south of the North Missouri Railroad, containing forty-one acres and twenty-nine hundredths of an acre; in all eighty-one $\frac{29}{100}$ acres, all in township forty-seven (47) north and in range number two (2) east of the fifth principal meridian.

That Isaac J. Pollard, vice-president of said Union National Bank, is one of the trustees named in said deed of trust, and Thomas K. Skinker, defendant, also is named as such; that said note, by its terms, is now due, said Union National Bank being now the holder thereof; that said bank, as such holder, has requested the said Shinker, defendant, as surviving trustee in said deed of trust, to proceed to sell said real estate to satisfy & pay said note & interest; that said Skinker, trustee, pursuant to said request and the terms of said deed of trust, as contained in said deed, has advertised all of said real estate for sale at public vendue at the east front door of the court-house, in the city of S't Louis & State of Missouri, on the 12th day of February, 1874, for the
5 purpose of paying & satisfying said note as aforesaid.

Plaintiff further says that she was induced to execute said note by the following considerations: The said Hugh B. Logan was a friend & neighbor of hers in said county of S't Charles, & desirous of embarking in some lucrative business; he was, however, without means, either in cash or credit, to control any sufficient amount of capital for said business; that at the time the said Logan was thus desirous of embarking in some business, as aforesaid, & before the execution of said note, the said Sterling Price & Co., being then engaged in business in the said city of S't Louis, represented to the plaintiff and the said Logan that they desired a partner in their said business, and would receive into their said firm the said Logan as such partner, upon condition that said Logan would pay into said firm the sum of fifteen thousand dollars, or that she, the said plaintiff, would execute her own note, together with said Logan, secured by deed of trust aforesaid, for the said amount of fifteen thousand dollars; that the said Sterling Price & Co., previous to the execution of said note, & as an inducement to its execution on her part as well as that of said Logan, represented to her and the said Logan that the said Sterling Price & Co. were doing a large and profitable business; that a partnership in said firm was very desirable and valuable, & that said firm was in a properous and solvent condition, & that if she desired to assist her friend a rare and extraordinary opportunity was then and there presented to secure for him an interest and partnership in a first-class firm and house in the city of S't Louis, and if she would execute said note and deed of trust to them, said Logan would obtain a valuable interest
as a partner in said firm, and that before the maturity of said note
6 the profits of said Logan as such partner would pay said note, so that in fact she would be required to pay nothing on account thereof; that the plaintiff, being desirous as aforesaid of assisting the said Logan, and relying upon the statements and representations made

to her and the said Logan as aforesaid, and believing the same to be true at the time she executed and delivered the said note and deed of trust as aforesaid.

And now plaintiff says all of said representations so made to her and the said Logan, as aforesaid, were false and fraudulent, and known to be such at the time by said Price & Co., in this, it was not true that said Price & Co. were doing a large and profitable business, as represented to her as aforesaid; it was not true that a partnership in said firm was either desirable or valuable, or that said firm was in a prosperous condition as represented as aforesaid, but that said firm at the time of said representations was insolvent; and it was not true that said Logan would obtain an interest in said partnership, whether valuable or otherwise, in consideration of said note *of said note* and deed of trust.

Plaintiff further states that all of the said representations made to her as aforesaid by the said Price & Co., as an inducement on her part to the execution of said note and deed of trust, were false and fraudulent; that after said Sterling Price & Co. had obtained said note, and the said Logan, in consideration thereof, had secured an interest and partnership as aforesaid in the said firm of Sterling Price & Co., as plaintiff supposed and had reason to believe, the said Price & Co., without any sufficient cause, declined and refused, although often requested so to do, to give to said Logan an interest as a partner in said firm as aforesaid, for which the said note and deed of trust of $15,000 dollars was executed and delivered; and the plaintiff states that in truth and
7 in fact the said Celsus Price and the said William M. Ladd, composing the said firm of Sterling Price & Co., as between themselves and the said Logan, at all times since the delivery of said note as aforesaid, have refused to give or concede to said Logan any interest in said copartnership, or in any manner recognize the said Logan as a member of said firm; that the said Sterling Price & Co., although often requested thereto, failed and refused to execute articles of copartnership with the said Logan, so that finally the said Logan, being convinced from the acts and doings of the said Price & Co., as aforesaid, that no such copartnership would be obtained as had been stipulated for, he was finally compelled to abandon all effort to secure such copartnership, and at the time of such abandonment, to wit, on the day of February, 1873, the said Sterling Price & Co. agreed to return to the said plaintiff the said note of fifteen thousand dollars, and have said deed of trust satisfied, which the said Price & Co. failed and refused to do, and so the plaintiff says and alleges the fact to be that there is and was no consideration whatever for said note and deed of trust, and that the same was procured from this plaintiff by false and fraudulent representations on the part of said Sterling Price & Co., as aforesaid.

Plaintiff further says that after the said note and deed of trust were thus procured from her, the said Celsus Price, by and with the consent of and for said Sterling Price & Co., he then and there being a director and member of the discount board in the said Union National Bank, and the said Isaac J. Pollard, one of the trustees in said deed of trust, then and there being vice-president of said Union National Bank, the said Price, Pollard, and the officers and agents in charge of the management of said national bank, well knowing the circumstances under which the said note and deed of trust were procured, and the inducements and considerations for which they were executed by the
8 plaintiff, did, nevertheless, accept said note and deed of trust as collateral security for certain indebtedness of said Sterling Price & Co. to said bank, and which is now, as plaintiff is informed and be-

lieves, the holder of said note, as collateral as aforesaid, and at whose request the said Skinker, trustee, is now acting and attempting to sell said real estate as aforesaid; and plaintiff further says that the said indebtedness of said Sterling Price & Co. to said bank, for which said bank now holds the said note as collateral, was created after the maturity of said note, as plaintiff is informed and believes.

And plaintiff further says that said Celsus Price and William M. Ladd, composing the said firm of Sterling Price & Co., in creating said debt to said bank, did not advise or consult with said Logan; that he received no portion of any of the moneys borrowed from said bank upon said collateral, and did not execute or join said Price & Co. in signing any note or other obligation to said bank for said monies or indebtedness.

And said plaintiff says that said note was procured by false and fraudulent representations of said Price & Co.; that there was and is a total failure of consideration therefor; that the said Union National Bank had notice at the date of the execution of said note, and at the date of the delivery thereof to it, of the nature of the inducements and consideration for which the same was executed.

Plaintiff further says that said Sterling Price & Co. are insolvent; that said real estate is worth an amount far in excess of said note, exclusive of the improvements; that a sale of said real estate, under said deed of trust as advertised as aforesaid, will greatly impair and cloud the title to, and otherwise injure, the same, and cause irreparable injury and damage to this plaintiff; that she is not indebted on account of said note in any sum whatever, and that the same is fraudulent and void.

Wherefore she prays the court to issue its writ restraining and enjoining the said Skinker, trustee, and the said Union National Bank and all the defendants herein from selling or attempting to sell said real estate under said deed of trust, or otherwise disposing of the same. That said note and deed of trust be adjudged and decreed to be made void, and of no effect; that the same be delivered up to the court for cancellation, and for such other and further relief as to the court may seem just and equitable, and plaintiff will ever pray, &c.

NOBLE & ORRICK,
Att'ys for Plaintiff.

STATE OF MISSOURI,
County of S't Louis, ss:

Elizabeth A. Mathews, the within-named plaintiff, being duly sworn, on her oath, says that the foregoing petition and the matters as therein stated she believes to be true, and that the relief she prays for in said petition will be eminently endangered unless immediately granted.

ELIZABETH A. MATTHEWS.

Subscribed & sworn to before me this 9th day of February, A. D. 1874.

Witness my hand and seal notarial.

[SEAL.]

THEO. F. CHILDS,
Notary Public, S't Louis Co., Mo.

And at the February term, 1874, and on the 9th day of February, 1874, the following order was made herein, to wit:

Order of injunction.

On application of plaintiff, by attorney, this day filed, it is ordered by

the court that on the plaintiff's giving bond in the sum of three thousand dollars, to be approved by the court, that Thomas Skinker, trustee, and the Union National Bank of S't Louis, and all the defendants herein be restrained and enjoined from selling the property described in the petition under a deed of trust executed by plaintiff, dated March 1st, 1871, and recorded in the office of the recorder of deeds for S't
10 Charles County, Mo., book , pages 510, 511, 512, & 513, until the further order of this court.

Bond filed and approved.

There is endorsed on said order the return of the sheriff, which is in the words and figures following, to wit:

Sheriff's return.

Executed this order of court, in S't Louis County, on the 12th day of February, 1874, by handing it to Thomas K. Skinker, who took and read the same, and by reading the same to Thomas H. Larkin, president of the Union National Bank of S't Louis, and to George J. Davis, assignee of Celsus Price and William M. Ladd, composing the firm of Sterling Price & Co.

P. C. TAYLER, *Sheriff*,
By G. L. HOLY, *Deputy*.

And at the same term, and on the ninth day of February, 1874, an injunction bond was given and filed, and is in the words and figures following, to wit:

Injunction bond.

Know all men, by these presents, that we, Elizabeth A. Mathews, as principal, and James E. Ashbrook, as sureties, are held and firmly bound unto Thomas K. Skinker, trustee, the Union National Bank of S't Louis & George I. Davis, assignee Sterling Price & Co., in the sum of three thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at S't Louis this ninth day of February, A. D. 1874.

The condition of the above obligation is such that whereas Elizabeth A. Mathews aforesaid, on the ninth day of February, A. D. 1874, obtained a restraining order or injunction against said Tho. K. Skinker, trustee, the Union National Bank of S't Louis, & George I. Davis, assignee:

Now, if the said Elizabeth A. Mathews shall pay all damages that may be occasioned by said restraining order or injunction and abide the decision that shall be made therein, and pay all sums of money, damages, and costs that shall be adjudged against her, if the injunc-
11 tion or restraining order be dissolved, then the above obligation to be void, otherwise to be and remain in full force and virtue.

ELIZABETH A. MATHEWS. [SEAL.]
JAMES A. ASHBROOK. [SEAL.]

Approved in open court, February 9th, 1874.

J. LEWIS, *Clk.*

Statement of summons and return.

On the filing of said petition a summons was issued which was returned, duly executed, by the sheriff.

And on the 24th day of March, 1874, the separate answers of the defendants were filed herein, and are in words and figures following, to wit:

Answer of George J. Davis, assignee, &c.

George J. Davis, assignee of Celsus Price & William M. Ladd, members composing the firm of Sterling Price & Co., of S't Louis, impleaded with others, by Hill & Bowman, his attorneys, for answer to plaintiff's petition, says he has no knowledge or information sufficient to form a belief of or concerning either or any of the matters stated in the plaintiff's petition, this defendant, acting in these matters of Sterling Price & Co. as the assignees of said firm, for the benefit of creditors, without any personal interest in this suit, & no interest whatever, except in his official capacity as assignee. Wherefore the defendant requires the plaintiff to make strict proof of each allegation in her petition, & whatever may be the result of the suit, this defendant prays to be hence dismissed with his costs.

HILL & BOWMAN,
Att'y for Def't Davis, Assignee.

Answer of Thomas K. Skinker, trustee.

Thomas K. Skinker, impleaded with others, for answer to the plaintiff's petition, states that he has no knowledge or information sufficient to form a belief of any one of the allegations in plaintiff's petition, except that this defendant is a trustee in a deed of trust described in plaintiff's petition, & that defendant, as such trustee, advertised said real estate described in said deed for sale to satisfy said note.

12 And this defendant having no other interest in this suit than as trustee, requires the plaintiff to prove all allegations made in said petition, and asks to be hence dismissed with costs, whatever may be the result of said suit.

H. DENISON,
Att'y for Def't.

Answer of the Union National Bank, of S't Louis.

The defendant, the Union National Bank of S't Louis, impleaded with others, by Hill & Bowman, its attorneys, for its separate answer to the injunction bill of plaintiff, says it denies that plaintiff was only surety on said note for said Logan, or signed & executed said note at his (Logan's) special instance or request; denies that plaintiff received no consideration for said note, and denies that the Union National Bank, of S't Louis, or either of its officers or agents knew of or had any knowledge whatever, or any information sufficient to form a belief whether said note was signed & executed, as stated in the plaintiff's petition, but, on the contrary thereof, said note was secured to be paid by a deed of trust on lands of said plaintiff, and was presented at said bank, in the regular course of business, as collateral security for money to be advanced to Sterling Price & Co., and on the 14th day of March, 1871, in the regular course of business, the money was advanced to Sterling Price & Co., which money was so advanced by said bank, upon said note as collateral security, & has never been repaid to said bank by said plaintiff, or said Logan, or said Sterling Price & Co., or any other person, but still remains due and unpaid.

This defendant says, that prior to or on the 14th day of March, 1871, neither said bank or either of its officers or agents, had any knowledge or information sufficient to form a belief of any of the alleged considerations stated in plaintiff's petition, nor whether said Logan was a friend or neighbor of plaintiff in S't Charles County, or desirous of embarking in some lucrative business, nor whether said Logan was without means, either in cash or credit, nor whether he was
13 without credit to control any sufficient amount of capital for such lucrative business, nor whether said Logan was thus desirous of embarking in some business as aforesaid, nor whether the said Sterling Price & Co. represented to plaintiff or said Logan that they desired a partner in the business of Sterling Price & Co., nor whether they would receive into their said firm the said Logan as a partner, upon consideration that said Logan would pay into said firm the sum of fifteen thousand dollars, nor whether said plaintiff would execute her own note together with said Logan, secured by deed of trust, aforesaid for said sum of fifteen thousand dollars, nor whether said Sterling Price & Co., previous to the execution of said note, or as an inducement to its execution on plaintiff's part as well as on the part of said Logan, represented to plaintiff and the said Logan, or either of them, that said Sterling Price & Co. are doing a large and profitable business, nor whether a partnership in said firm was very desirable or available, nor whether said firm was in a prosperous & solvent condition, nor that if plaintiff was desirous to assist her friend a rare & extraordinary opportunity was then & there presented to secure for said Logan an interest and a partnership in a first-class firm & house, in the city of S't Louis, nor whether, if plaintiff would execute said note & deed of trust to them, said Logan would obtain a valuable interest as a partner in said firm, nor whether that before the maturity of said note the profits of said Logan as such partner would pay said note, so that, in fact, plaintiff would be required to pay nothing on account thereof, nor whether the plaintiff, being desirous of assisting said Logan, and relying upon the statements or representations made to her & said Logan as aforesaid, and believing the same to be true at the time, executed & delivered said note and deed of trust as aforesaid; nor whether any or all of said alleged representations were false or fraudulent, or known to be so at the time by said Sterling Price & Co.; nor whether it was not true that said Price & Co. were doing a large or profitable business as
14 represented to plaintiff as aforesaid; nor whether it was not true that a partnership in said firm was either desirable or valuable; nor whether said firm was in a prosperous condition, as represented as aforestated; nor whether said firm was insolvent at the time of said representations; nor whether it was not true that said Logan would obtain an interest in said partnership, whether valuable or otherwise, in consideration of said note and deed of trust.

This defendant further says the said bank, its officers & agents, had no knowledge or information sufficient to form a belief whether any of the alleged representations were ever made by the said Price & Co. to said plaintiff or said Logan as an inducement on plaintiff's part to the execution of said note and deed of trust, nor whether they were false or fraudulent; nor whether after said Sterling, Price & Co. had obtained said note, and the said Logan in consideration thereof had secured an interest & partnership as stated in said firm of Sterling Price & Co. as plaintiff pretends to have supposed & believed, the said Price & Co., without any sufficient cause, declined & refused, although often requested so to do, to give said Logan an interest as a partner in said

firm, for which the said note & deed of trust of $15,000 was executed and delivered; nor whether said Celsus Price & William M. Ladd, of said firm of Sterling Price & Co., have ever refused to give or concede to said Logan any interest in said copartnership, or in any manner recognize said Logan as a member of said firm; nor whether said Sterling Price & Co., upon request to do so, have ever failed or refused to execute articles of copartnership with said Logan; nor whether said Logan ever abandoned said copartnership for the reasons stated; nor whether at the time said Logan so abandoned the same on the day of February, 1873, the said Sterling Price & Co. agreed to return to the said plaintiff the said note of 15,000, dollars, and have said deed of trust satisfied; nor whether there was any consideration for said note & deed of trust as between plaintiff & Sterling Price & Co.

15 And this defendant denies that said note and deed of trust were procured from the plaintiff by false & fraudulent representations on the part of the said Price & Co.

This defendant denies that said Celsus Price, as a director & member of the discount board, or said Pollard, as vice-president of this defendant & trustee in said deed of trust, knew anything of the circumstances alleged in the petition as those under which the said note & deed of trust were procured from plaintiff, or knew anything of the inducements & considerations for which they were executed by the plaintiff.

This defendant avers that it accepted said note and deed of trust on the 14th of March, 1871, as security for the sum of $15,000, then & there advanced & loaned to said Sterling Price & Co., at said bank in the city of S't Louis, on the security of said note and deed of trust, without any knowledge of any of the circumstances or facts concerning the same as stated in the plaintiff's petition; and the said advance to said Sterling Price & Co. upon said note & deed of trust, made on the 14th of March, 1871, has never been paid by said Price & Co. to said bank, or any other person.

This defendant denies that the said indebtedness of said Sterling Price & Co., to said bank was created after the maturity of plaintiff & Logan, & this defendant avers that the same money advanced upon said note & deed of trust was advanced on the 14th of March, 1871, & there has never been any money a[dvanced] thereon to said Price & Co., or to any other person, since that date, nor has the same or any part thereof ever been pa[id] by said Price & Co., or any other person.

This defendant has no knowledge or information sufficient to form a belief whether said Price & Ladd, when they got the money of said bank on the 14th of March, 1871, advised or consulted with said Logan or not, nor whether said Logan received any portion of the moneys borrowed from the said bank upon said collateral, and this defendant denies that said Logan ever signed any such note as an individual, & unless he was a member of the firm of Sterling Price & Co. said Logan did not sign any note payable to this defendant.

This defendant denies that said note of the plaintiff & Logan was procured by fraudulent representations of said Price & Co., & denies that there was or is a total failure of consideration thereof as stated, and denies that this defendant, its officers, directors, or agents, had notice at the date of the execution of said note, or at the date of the delivery thereof to this defendant, of the nature of the inducements

16 & considerations for which the same was executed, as stated in plaintiff's petition.

This defendant denies that said note of the plaintiff is fraudulent or void, and defendant avers that the plaintiff is indebted to this defendant

on account of said note in the full amount thereof, with interest thereon, and the said real estate is liable to be sold on the said deed of trust to satisfy said note due said bank. This defendant denies that plaintiff has any equities as against this defendant, or the said note in the possession of & owned by this defendant on & after the 14th of March, 1871.

Wherefore this defendant prays that the injunction in this case be dissolved, that the damages be assessed according to the statute, and that judgment be entered therefore in favor of this defendant, & that plaintiff's petition be dismissed with costs.

HILL & BOWMAN,
Att'ys for the Union National Bank of S't Louis, Defendant.

COUNTY OF S'T LOUIS, *ss:*

William Shields, being duly sworn, says he is the cashier of the Union National Bank of S't Louis, & has been for four years last past; that he believes the foregoing answer and the matters therein stated are true, and further says not.

W'M SHIELDS, *Cash.*

Sworn to and subscribed before me this 21st day of March, 1874.
[SEAL.] FRANK J. BOWMAN,
Notary Public.

And on April 20th, 1874, the plaintiff filed a reply to the answer of the Union National Bank of S't Louis, in the words and figures following, to wit:

Reply.

Plaintiff, for reply to answer of the Union National Bank of S't Louis, one of the above-named defendants, denies that the note and deed of trust in said answer mentioned was presented at said bank as collateral security for money to be advanced to Sterling Price & Co. in the regular course of business as alleged; denies that on the 14th day of
17 March, 1871, said money was so advanced to said Price & Co. in the regular course of business as alleged, but states that the acceptance of said note and deed of trust by said bank was out of the regular course of business of said bank.

And having fully replied, plaintiff prays for judgment.

NOBLE & ORRICK,
Att'ys for Pl'ff.

And, afterwards, at the April term, 1874, and on the 18th day of May, 1874, the following further proceedings were had herein, to wit:

Injunction made perpetual.

ELIZABETH A. MATHEWS
vs.
THOMAS K. SKINKER, THE UNION NATIONAL Bank of S't Louis, and George J. Davis, assignee of Celsus Price and William M. Ladd, composing the firm of Sterling Price & Co.

Now come the parties by their respective attorneys, and the plaintiff moves for judgment on the pleadings herein, which being heard and fully considered by the court, is sustained

Thereupon, on motion of plaintiff by attorney, it is ordered by the court that this cause be dismissed as to the defendant George J. Davis, assignee of Celsus Price and William M. Ladd.

And it is ordered, adjudged, and decreed by the court that the injunction heretofore granted herein on the 9th day of February, 1874, be, and the same is hereby, made perpetual against the Union National Bank of S't Louis, and that Thomas K. Skinker be perpetually enjoined from selling the property described in the petition at the instance of said bank, and that said defendants, Thomas K. Skinker and the Union National Bank of S't Louis, pay the costs of this proceeding, and that execution issue therefor.

Bill of exceptions filed.

And on the same day a bill of exceptions was filed, which is in the words and figures following:

18 *1st bill of exceptions. Special term.*

Be it remembered that on the calling of this cause for hearing the complainant moved the court for a perpetual injunction against the Union National Bank upon the pleadings this cause, and thereupon the court sitting to hear this cause in equity granted said motion to make the said injunction perpetual as against the said Union National Bank. And the defendant, said bank, then and there excepted to said decision of the court. And defendant's counsel insisted that said court should go on with the cause as for the other defendants & George J. Davis, the assignee of Price & Ladd, but on motion of plaintiff the court dismissed the cause as to all the other defendants except the said bank, to which decision the defendants then and there excepted.

All of which is made a part of the record in this case, as witness my hand & seal on this eighteenth day of May, 1874, as judge of this court.

CHESTER H. KRUM, *Judge.*

And afterwards, at the June term, 1874, and on the 8th of June, 1874, the following further proceedings were had herein, to wit:

Motion for a rehearing overruled.

The motion for rehearing herein, being heard and fully considered by the court, is overruled.

And afterwards, at the same term on the same day, the following further proceedings were had herein, to wit:

Appeal allowed to general term.

Now come the defendants by their attorney and file a bill of exceptions, and pray an appeal to the general term of this court, which is allowed.

Said bill of exceptions is as follows:

2nd bill of exceptions at special term.

19 Be it remembered that after the filing of the first bill of exceptions in this cause, on the 18th May, 1874, the defendant, the Union National Bank of S't Louis, on the 20th day of May, 1874, filed its motion by attorney for a rehearing, as follows:

Motion for a rehearing.

The defendant, The Union National Bank, by Hill & Bowman, its attorneys, come and move the court for a rehearing in this cause for the reasons following:

1st. Because on the petition, answer, and reply the plaintiff was not entitled to the decree for a perpetual injunction restraining the sale of the property of the complainant under the deed of trust to Thomas Skinker, trustee for Sterling Price & Co., but on the contrary thereof the court should upon the pleadings have dissolved the said injunction, and the damages should be assessed thereon.

2nd. Because the court erred in holding the said deed of trust to be within the perview of the national bank act, or that the same was given to said bank, the defendant, to secure future advances.

3rd. Because the court erred in permitting the suit to be dismissed as against the other defendants, who had a right to demand a dissolution of said injunction as against them and to claim their damages.

4th. Because the plaintiff had no equity to claim the interference of the court; that she was estopped from denying the validity of the note & deed; that the note and deed were made to Sterling Price & Co.'s trustee for their security, & not for the security of the bank until said Price & Co. delivered it to the bank as collateral security, and because the bank acquired no title to said deed of trust & note as collateral security until the note discounted for them by the bank became due, wherefore the defendant prays for a rehearing.

HILL & BOWMAN,
Att'ys for Def't, The Union National Bank of S't Louis.

20 And the said defendant moved the court to allow said motion, but the court on the 8th of June, 1874, overruled said motion for a rehearing, and the defendant then and there objected and accepted. And the said defendant, The Union National Bank of S't Louis, then and there prayed for an appeal to the general term of the circuit court, and said appeal was allowed, and the former bill and this bill are made a part of the record in this case, as witness my hand and seal in this same term as judge of this court.

[SEAL.] CHESTER H. KRUM, *Judge.*

And afterwards, to wit, at the general term of this court, June term, 1874, and on June 22nd, 1874, the following further proceedings were had herein, to wit:

Judgment affirmed.

Now come the parties by their respective attorneys, and declining to argue the cause herein, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the court at special term be, and the same is in all things hereby affirmed pro forma at defendants' costs, and that execution issue therefor.

And on the 26th day of June, 1874, the following bill of exceptions was filed at general term:

Bill of exceptions at general term.

Be it remembered that the above-entitled cause came on to be heard

in general term on appeal from special term, and the defendants insisted that the motion for a rehearing should have been granted, and the general term refused to reverse the said decree and judgment of the special term, to which the defendants at the time excepted and prayed that an appeal be granted them to the supreme court, which is done. All of which is made a part of the record, as witness the hand and seal
21 of the presiding judge of said court this same term.

[SEAL.] JAMES J. LINDLEY.

Circuit clerk's certificate.

STATE OF MISSOURI,
County of S't Louis, ss:

I, John Lewis, clerk of the circuit court of S't Louis County, within and for the county & State aforesaid, certify the above and foregoing to be a true and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the city of S't Louis, this 27th day of August, 1874.

[SEAL.] JOHN LEWIS, *Clk.*

And afterwards, said cause coming on for hearing in the supreme court, held at S't Louis, of the State of Missouri, the following proceedings were had therein, to wit:

The following judgment was rendered herein at the January term, 1876, and on Monday, February 21st, 1876:

Judgment.

ELIZABETH A. MATHEWS, DEFENDANT IN error, *vs.* THE UNION NATIONAL BANK OF S'T LOUIS, et al., plaintiffs in error.	Error to the circuit court of S't Louis, County.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said circuit court of S't Louis County, be in all things affirmed and stand in full force and effect, and that the said defendant in error recover of the said plaintiffs in error her costs and charges herein expended, and have execution therefor.

Opinion filed.

22 Which opinion is in words and figures following, to wit:

Opinion of the court.

The error complained of in this case is the action of the court in rendering a perpetual injunction restraining the trustees from selling the plaintiff's property. From the record it appears that the plaintiff executed her note payable to Sterling Price & Co., for $15,000, due two years after date; and to secure the payment of the note she made a deed of trust bearing even date with the same on certain real estate belonging to her. The note and deed of trust were delivered to Sterling Price & Co., who afterwards transferred them to the Union National Bank of

S't Louis, a banking institution organized under the act of Congress, to secure a loan for $15,000 advanced to Price & Co. by the bank. Price & Co. having failed to pay the money advanced on the note and secured by the deed of trust, the trustee at the request of the bank advertized the property for sale, and the plaintiff filed her petition to enjoin the trustee and the bank from proceeding with the sale. Whether the deed of trust in the hands of the bank amounted to a valid security which could be inforced in payment of the money advanced depends upon the construction of the act of Congress providing for the foundation of national banking associations (Rev. St. U. S., p. 998).

By section 5136 of the Revised Statutes, authority is given to the banking associations to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security, &c.

23 By section 5137, it is provided that "A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it."

The act, as will be thus seen, gives the associations power to loan money on personal security, and to purchase, hold, and convey real estate in certain specified cases. The general principles defining the extent and mode of exercise of corporate powers are well settled and have often been passed upon by this court. Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power (S't Louis vs. Russell, 9 Mo., 507; Blair vs. Perpet. Ins. Co., 10 Mo., 559; Ruggles vs. Collier, 43 Mo., 353). They must act strictly within the scope of the powers conferred on them by the act calling them into being, and where a grant of power from the legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them (H. & St. J. R. R. Co. vs. Marion Co., 36 Mo., 294). The distinction between natural persons and corporations is that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred on them by their charters (Bank of Louisville vs. Young, 37 Mo., 398). In Great Eastern Railway vs. Turner (L. R., 8 Ch. Ap., 152), Lord Chancellor Sel-

24 borne gave a brief and comprehensive statement of the law applicable to questions of corporate powers. He said: "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently an act which is ultra vires and unauthorized is not an act of the company, in such a sense as that the consent of the company to that act can be pleaded."

As this case depends upon the interpretation of a national statute, we may refer to some of the cases in the United States Supreme Court to

see what view that tribunal has taken of the law construing the powers of corporations.

In the Bank of the U. S. vs. Dandridge (12 Wheat., 64), the rule is stated to be that, "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them upon the construction of the statute itself."

In Head vs. Prov. Ins. Co. (2 Cranch, 127), Ch. J. Marshall, defining the powers and limitations of statutory corporations with great clearness, as follows: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner the act authorizes." Judge Strong, now of the Supreme Court of the United States, in delivering the opinion of the Pennsylvania court in a case where the national banking law was directly brought in ques-
25 tion, said: "The bank is a creature of the act, dependent on it for all its powers, and controlled by all the restrictions which the act imposes" (Venango Nat. Bank vs. Taylor, 56 Penn. St., 15).

In all the cases where questions have been raised respecting the powers and liabilities of national banks, it has been invariably held that the banks have only the powers conferred upon them in the act providing for their formation; that from that act they derive their sole authority, and that they must be strictly governed by it, and kept within the line of its limitations. In Wiley vs. The First National Bank of Brattleboro (47 V't, 546), it was decided that the taking of special deposits to keep merely for the accommodation of the depositor was not within the authorized business of banks organized under the act of Congress, and that the cashiers of such banks had no power to bind them on any express contract accompanying or any implied contract arising out of such taking. So in a recent case in Maryland (Weckler vs. The First Nat. Bank of Hagerstown, 14 Ann. Law Reg., N. S., 609), it was held that in the act authorizing the incorporation of national banking associations the kind of banking was limited and defined, and, as the act contained no grant of power to engage in bond brokerage, it was therefore prohibited to the banks, and that it was not necessary to the purpose of their existence, or in any sense incidental to the business of banking. It was accordingly decided that in an action of deceit against a national bank, seeking to recover damages for the alleged fraudulent representations of its teller, made in the sale to the plaintiff of certain railroad bonds, that the business of selling bonds on commission was not within the scope of the powers of national banking associations, and that the bank could not, under any circumstances, carry it on, and, being thus beyond its corporate powers, the defence of ultra vires was open to it, and that it was not responsible for any false representations made
26 by its teller by which the plaintiff might have been damaged.

The very question which comes up for adjudication in this case was presented and passed upon in Fowler vs. Sealty (72 Penn. St., 456). In that case Fowler, without any previous indebtedness, gave to the First National Bank of Pittsburg a mortgage to secure the bank for notes, &c., thereafter to be discounted for him. Upon a proceeding for foreclosure, the court decided that lending money by a national bank

on mortgage or real estate security was ultra vires, and forbidden, and the mortgage was declared to be void.

National banks possess just such powers as the act incorporating them gives to them, no more. They are the creatures of the act, and controlled by all its restrictions and limitations. Express power is given to them to "carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of the act." Banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt, the buying and selling of bills, bullion, and lending of money on personal security. To permit them to loan their money on real-estate security would be destructive of their efficiency, and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes, and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also hazardous, and have no legitimate connection with the business of banking; they require the em-
27 ployment of outside parties to look after the land and examine titles, and are apt to embark the banks in enterprises which sooner or later will end in insolvency. Congress doubtlessly had these considerations in view when it provided that the money should be loaned on personal security. Where the mode of personal security was declared and pointed out, that excluded all others, for the maxim expressio unius est exclusio alterius must prevail in this case.

But the intention does not rest merely on the provision requiring personal security or loans. Section 5137 specifies for what purposes national banking associations may purchase, hold, and convey real estate, and forbids their dealing in that kind of property for any other purpose. They may purchase and hold so much real estate as may be necessary for their immediate accommodation in the transaction of their business; such as may be mortgaged to them in good faith by way of security for debts previously contracted; such as shall be conveyed to them in satisfaction of debts previously contracted in the course of their dealings, and such as they shall purchase at sales under judgments, decrees, or mortgages held by them, or shall purchase to secure debts already due. These are the specified instances, and the only instances, in which it is permissible for national banking associations to purchase or hold real property. Aside from the real estate necessary for the transaction of their business, they can only acquire that description of property to enable them to secure themselves for debts previously contracted. But in no case can they loan money on the faith of real estate security where the debtor was not previously indebted to them. If they do, the security taken is ultra vires and void, and may be pleaded by the party as a defence against its enforcement.

28 The case at bar shows that there was no previous dealings between the plaintiff and the bank; the bank loaned the money and took the deed of trust as security; this it had no power to do, and the judgment of the court below will be affirmed.

All the judges concur, except Judge Vories, who is absent.

DAVID WAGNER.

And thereafter, to wit, on the 25th day of March, A. D. 1876, there was filed in said cause a bond, a citation, and a writ of error, in words and figures following, to wit, and also on January 7th, 1876, there was filed an assignment of errors, as follows, to wit:

28½ In supreme court of the State of Missouri, January term, 1876.

And now come the said appellants and say that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellants assign the following, to wit:

1. That said court admitted improper and illegal testimony offered by the plaintiff.
2. That said court rejected proper and legal testimony offered by defendants.
3. That the court gave the jury improper and illegal instructions.
4. That the court refused to give to the jury proper and legal instructions offered by defendants, appellants.
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the plaintiff when it should have been rendered for the defendants, appellants.

That said court overruled the motion for a new trial made by appellants.

HILL & BOWMAN,
Att'ys for Appellants.

And now come the appellee and, for joinder in error, say there is no error in the record and proceedings of said circuit court in said cause as assigned by said appellants.

NOBLE & ORRICK,
Atty's for Def't in Error.

29 Know all men by these presents that we, the Union National Bank, as principal, and Thomas H. Larkin as surety, are held and firmly bound unto Elizabeth A. Matthews in the full and just sum of five hundred dollars, to be paid to the said Elizabeth A. Matthews, her heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at the January term, 1876, of the supreme court of the *United* State of Missouri, in a suit depending in said court between Elizabeth A. Matthews, plaintiff, and the Union National Bank of S't Louis, Thomas K. Skinker, and George J. Davis, assignee of Celsus Price & W'm M. Ladd, composing the firm of Sterling Price & Co., defendants, judgment was rendered against the said defendants, Union National Bank of S't Louis et als., and the said defendants, Union National Bank of S't Louis et als., having obtained a writ of error out of the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Elizabeth A. Matthews, citing and admonishing her to be and appear at a Supreme

Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Union National Bank & others, defendants, shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

UNION NAT'L BANK, [SEAL.]
By THO'S H. LARKIN. [SEAL.]
THO'S H. LARKIN. [SEAL.]

Approved by—

DAVID WAGNER,
Chief Justice, Sup. Court M'o.

30 The United States to Elizabeth A. Matthews, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein the Union National Bank of S't Louis, Thomas K. Skinker, George J. Davis, assignee of Celsus Price and William M. Ladd, composing the firm of Sterling Price & Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David Wagner, chief judge of the supreme court of the State of Missouri, this 25th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

DAVID WAGNER,
Chief Judge Supreme Court of State of Missouri.

31 We accept service, by copy, of the within citation this March 25th, 1876, at S. Louis, Missouri.

NOBLE & ORRICK,
Attorneys of Record for Elizabeth Matthews.

(Indorsed:) Supreme court State of Missouri. Elizabeth A. Matthews vs. The Union National Bank of S't Louis. Citation. Filed March 25th, 1876. J. Thornburgh, clerk.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Missouri, at the January term thereof, 1876, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Elizabeth A. Matthews, plaintiff, and The Union National Bank of S't Louis, Thomas K. Skinker, George J. Davis, assignee of Celsus Price and William M. Ladd, composing the firm of Sterling Price & Co., defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein

was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Issued at office in the city of Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Circuit Court.

Allowed by

DAVID WAGNER,
Chief Judge Supreme Court Mo.

33 STATE OF MISSOURI, *ss:*

I, Josiah Thornburgh, clerk of the supreme court held at S't Louis, of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States a full, true, and complete transcript of the record and proceedings in the within entitled cause, as fully as the same remain of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office in the city of S't Louis, this seventh day of April, 1876.

[SEAL.] JOSIAH THORNBURGH, *Clerk.*

(Indorsement on cover): No 128. The Union National Bank of S't Louis, Thomas K. Skinker, Geo. I. Davis, assignee of Sterling Price & W'm M. Ladd, plaintiff in error, vs. Elizabeth A. Matthews. Missouri Sup. Court. Filed 14th July, 1876.

C

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK ST. LOUIS, ET AL.

vs.

ELIZABETH A. MATTHEWS.

P. PHILLIPS,
BRITTON A. HILL,
For Plaintiff in Error.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK ST. LOUIS, ET AL.

vs.

ELIZABETH A. MATTHEWS.

Brief of P. Phillips and Britton A. Hill for Plaintiffs in Error.

Elizabeth A. Matthews, together with Hugh B. Logan, executed on 1st March, 1871, their joint and several note in favor of Price & Co., for the sum of $15,000, payable two years after date.

To secure the payment of this note, she executed on same day a deed of trust on certain real estate situate in the county of St. Charles, State of Missouri.

The note was subsequently discounted for Price & Co. by the Union National Bank of St. Louis.

The litigation arises on a petition filed February, 1874, by Elizabeth A. Matthews in the circuit court of St. Louis County, in which she avers that she ought not to be held bound by her note or deed, for the reasons stated therein, and that the matters on which she seeks relief were known to the Bank "at the date of the execution of the note, and at the date of the delivery thereof to it."

The petition also charges that "the indebtedness of Price & Co. to the Bank, for which the Bank now holds the said note as collateral, was created after the maturity of the note, as plaintiff is informed and believes."

The prayer is for an injunction "restraining and enjoining the said Skinker, trustee, and the said Union National Bank, and all the defendants, from selling, or attempting to sell, said real estate in said deed of trust, or otherwise disposing of the same; that said note and deed of trust be adjudged and decreed to be made void and of no effect; that the same be delivered up to the court for cancellation; and for such other and further relief as to the court may seem just and equitable." 5.

The answer of the Bank is responsive to all the allegations. It specifically denies that the plaintiff was only a surety on the note for said Logan, or that she signed and executed it at his request, and that she received no consideration therefor. It denies that "the Bank or either of its officers or agents knew or had any knowledge whatever, or any information sufficient to form a belief whether said note was signed and executed as stated in the plaintiff's petition; but, on the contrary thereof, the said note was secured to be paid by a deed of trust, and was presented to the bank, in the regular course of business, as collateral security for money to be advanced to Sterling, Price & Co.; and on the 14th March, 1871, in the regular course of business, the money was advanced by said Bank upon said note as collateral security, and never has been repaid to said Bank by ihe plaintiff, or said Logan, or said Price & Co., or any other person, but still remains due and unpaid." 7.

Again, it is averred that the Bank "accepted the note and deed of trust on the 14th March, 1861, as security for the sum of $15,000, then and there advanced and loaned to Price & Co., at said Bank in the city of St. Louis, on the security of said note and deed of trust, without any knowledge of the facts or circumstances concerning the same, as stated in the plaintiffs' petition. 9.

On this petition, answer, and a special replication that the bank accepted the note and deed of trust out of the regular course of business, the plaintiff moved for judgment on the pleadings, "which motion was granted, and the preliminary injunction was made perpetual." pp. 10, 11.

On appeal to the Supreme Court this judgment was affirmed.

The ground upon which these judgments are placed, is that, the charter did not authorize the Bank to loan money on a note secured by mortgage on real estate, under the circumstances disclosed in this case.

The opinion of the Supreme Court affirming the judgment below, is to be found at p. 13.

As the claim of the Bank arises under authority conferred by Congress, and the right set up has been denied a Federal question is presented, which justifies the writ of error to the Supreme Court of the State.

Assignment of Error.

The Court erred in sustaining the judgment, perpetually "enjoining the defendants from selling the property described in the petition, under the deed of trust executed by the plaintiff." P. 6.

The question in this case, arises under the following sections of the "Act to provide a National Currency, June 3d, 1864." 13 Stats., p. 99, re-enacted in sections 5136, 5137, R. S., which are as follows:

5136. To exercise by its board of directors or duly authorized officers or agents subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating

promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provision of this title.

5137. A National Banking Association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the Association, or shall purchase to secure debts due it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts for a longer period than five years."

As the case was heard, we have the case presented thus:

Mrs. Matthews being indebted to Price & Co., executed her promissory note to them, and to secure its payment conveys by deed of trust certain real estate.

Before maturity of said note, and some fourteen days after its date, Price & Co. present this note and deed of trust to the Bank, which "then and there advanced and loaned" to them the amount of the said note, to wit.: the sum of $15,000.

It is averred by the answer of the Bank that this

transaction was made in the "regular course of business," and that the said money was advanced upon the "security of said note and deed of trust, without any knowledge of any of the circumstances or facts concerning the same." p. 9.

The question then, is whether such a transaction was *ultra vires*.

Does the fact that the Bank relied for security on this trust deed, as well as on the personal responsibility of the makers and payees of the note, vitiate the contract between the Bank and the payees of the note?

It is declared by the statute that the Bank may loan money on personal security. But this is not an inhibition against making a loan when the security of real estate is superadded to the personal security.

In making a long loan the Bank might be satisfied with the present personal responsibility of the parties to a note, but in the absence of any positive statutory prohibition, why may they not guard against the contingencies of the future by receiving from the loanee the benefits of a security on real estate, created for his protection?

We may be told that there is such an inhibition in the second and third clause of sec. 5137, which limits the power of the Bank to "hold real estate, to such as may be mortgaged to it in good faith by way of security for debts previously contracted, and such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings."

It is sufficient to answer that case in hand does not fall at all within these limitations.

There is no pretense that there was any mortgage or conveyance of real estate *to* the Bank.

The mortgage was to trustees to secure the payees of the note.

By this conveyance no title to real estate was vested in Price & Co. They had only a lien which could be enforced in default of payment by the maker of the note, and this was all that Price & Co. passed to the Bank.

Potter vs. *McDowell*, 43 Mo., 93.

Watson vs. *Hawkins*, 60 Mo., 550.

The mortgage was a mere incident to the note, and stood as security for its payment to whoever might become the holder thereof in good faith, although ignorant at the time of taking it, of its existence.

In *Green* vs. *Hart*, 1 Johns. Rep., 590, SPENCER, J. "Had the mortgage not been delivered nor anything said about it, I should have considered the respondent (the assignee), on failure of the mortgagor to pay the note, entitled to the aid of the mortgage."

Chappel vs. *Allen*, 38 Mo., 213.

If the Bank had loaned the money on the personal responsibility of the parties to the note without knowledge of the mortgage at the time, its right upon subsequent knowledge to enforce the lien incident to the note, could not have been successfully resisted by the allegation that to permit it to do so would be to authorize a violation of its charter.

Can it make any difference that when the note was delivered to the Bank it had knowledge of the security?

We know of no case which bears the features of this in which there has been a decision adverse to the Bank, except the one in hand, and this seems to be rested upon the authority of *Fowler* vs. *Scully*, 72 Penn., S., 699.

In this case a mortgage of real estate was executed directly to the Bank by Fowler, and it recites that the Bank had agreed to discount for him an amount in the aggregate not to exceed the sum of $100,000, in such negotiable notes as he should offer, the said Fowler wishing to

avoid the necessity of procuring the endorsement of a third party. (p. 700.)

The action was *scire facias*, by Scully in trust for the Bank, to enforce the payment of the mortgage, the loans having amounted to $77,000.

It was held by the court that the argument was unsound which asserted that the mortgage is not real estate, and therefore it could not be said that the Bank holds real estate when it holds the mortgage. The decision is that this was a mortgage for future advances and that the Bank was not authorized to lend money on such security.

The fact appeared that the mortgage was executed and recorded on 21st October, 1869, and the first discount was made on the 11th April, 1870.

How widely this case differs from the one in hand is too apparent to need comment.

We call attention to the reply of the court to another argument urged on behalf of the Bank. (p. 707.)

"It is further argued that to prevent injustice equity will regard the mortgage as delivered anew, on each discount or advance. This will do *inter partes* to prevent wrong; but such a fiction cannot confer a power upon a corporation withheld from it by its charter. The error is in forgetting that this is a question of statutory power and public policy, not of mere equity between the parties."

This reply of the court carries it with the implication that if the mortgage could legally be considered as having been delivered when the discount or loan was made, it would have been valid in the hands of the Bank.

held

The scope and reach of the judgment is to be found in the concluding words of the opinion: "The mortgage is on its face a security for future advances, and the

schedule of the debts claimed under it shows their subsequent character. *The action must therefore fail.*

Even to the extent to which this judgment goes—SHARSWOOD and WILLIAMS, J. J., dissented.

We submit, confidently, that the learned judge who tried the case now before us, greatly erred when he says: "The very question which comes up for adjudication in this case was presented and passed upon in *Fowler* vs. *Scully*, 72 Penn., S. 1."

We, however, may cite the case of the *First National Bank* vs. *Haire*, 36 Iowa, 443, which directly sustains the views we have submitted in support of the validity of the act in controversy.

Here the Bank refused to negotiate a loan on the responsibility of the firm, but agreed to, and did make, the loan upon a note made by one member of the firm to the other and endorsed by the latter to the Bank, the maker giving a mortgage upon his separate property to secure the indorser, with an agreement that in case of default the security should enure to the Bank; this was held to be a valid transaction and the mortgage was enforced for the benefit of the Bank.

The court held that the terms of the act did not prohibit the mortgage of real property to another, to be by that other held as security for a contemporaneous loan made by the Bank. The act says that the Bank may hold such real estate as shall be mortgaged *to it* in good faith for debts previously contracted, and that such association shall not hold real estate for any other purpose than as specified.

Now it will be noticed that the real estate in controversy was not mortgaged *to the* plaintiff (Bank) and that the plaintiff does not now hold it.

"Hence the case is not within the letter of the statute. But it is claimed that the effect of the transaction as proved, is the same as a mortgage *to it*, and is, therefore, within the spirit of the law.

"When prudent officers of a bank are asked to make a loan, they look *inter alia* to the ability of the borrower to pay as evidenced by his property real and personal. If he has not sufficient property they decline the loan; but if some friend of his shall convey to him in fee, sufficient real estate, the same officers might make the loan. The loan so made would not be within the act, although the officers in good faith relied upon such real estate by way of security for repayment of the loan.

"And if an indorser was offered who was thought insufficient, but when certain real estate was conveyed to him he was regarded as sufficient, the rule would be the same.

"And if instead of being conveyed absolutely, it was simply mortgaged to the indorser, and thereby he was thought to be sufficient security, the rule would not be different.

"In either case reliance would be upon the real estate and the ability to pay by reason of it. Neither would be within the prohibition of the act of Congress; nor would it alter the case if the borrower or endorser should say to the officers, if I feel to pay at maturity, there is the real estate, and you may subject it to the payment of the debt.

"In other words, every loan or discount by a Bank is made in good faith in reliance by way of security upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the Bank, or directly for its use, the case is not within the prohibition of the statute."

The case now before the court is more clearly consist-

ent with the provisions of the act, than the one passed upon by the Iowa Court, in which the note was purposely made for the loan with the concurrence of the Bank and in which it may have been argued that it was an evasion of those provisions. Here the Bank had nothing to do with the ~~instruction~~ making of the note and the execution of the deed of trust, and was entirely ignorant of the circumstances which gave birth to them.

In *Merchants' National Bank* vs. *Mears*, (Thompson's National Bank Cases, 353,) we have another decision leading to the same conclusion.

Mears borrowed from the bank a certain sum, depositing as security the note of another party, secured by mortgage on real estate. On a suit to foreclose this mortgage, and on the plea of *ultra vires*, it was held by Judge BLODGETT that the loan cannot be said to have been made upon real estate security. It was made upon a note to Mears secured by collateral. The collateral was the Warren note, with *such incidental security as the* Warren *note had.*

The act authorizes loans to be made "on personal security," but this cannot be held as limiting the transaction to the personal undertaking of the parties to the note made for the specific purpose of obtaining the loan.

It would be no violation of the act if the Bank should require as collateral a deposit of bonds or stocks, either of States, municipalities, or incorporated companies.

Shoemaker vs. *National Bank*, 2 Abbot U. S. Cases, 416;
Schooler, Personal Property, pp. 87, 94;
Pittsburg Car Works vs. *Bank;*
Thompson's National Bank Cases, 315.

In many of these instances the bonds or stock have a security on real estate which may be enforced in case of default. This, however, does not change the character

of the collateral, or make it other than "personal security."

There is another question for consideration.

There can be no doubt that the Bank, in this transaction, acted in good faith and in the belief that it was entirely warranted by the powers conferred in its charter.

On the other side the attacking party, under the circumstances disclosed, must be considered as having received the benefit of the loan made by the Bank.

Can she now be permitted to retain this advantage and ask of a court of justice, upon a sharp question of construction, to cancel the contract she has made and thus inflict a heavy loss upon the stockholders and creditors of the Bank?

There is some contrariety of decision upon this question, and we refer the court to some of the numerous cases which hold the negative of the proposition:

Smith vs. *Sheely*, 12 Wall., 360.
Gold Mining Co. vs. *Nat. B'k*, 96 U. S., 640.
Silver Lake B'k vs. *North*, 4 Johns. Chan., 370.

In the case last cited the charter of the Bank, like the one now before us, only authorized the Bank to take a mortgage "for debts previously contracted." The court, while sustaining the loan as within the meaning of the act, added, that if the Bank had passed "the exact line of its power, it would rather belong to the government to exact a forfeiture of the charter, than to the court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract."

This decision is repeated in *Steam Navigation Co.* vs. *Wood*, 17 Barb., s. c. 380, and supported by the judgments of the courts of Massachusetts, Pennsylvania, and other States.

Ang. & A., Corp., §153.

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While the charter nowhere declares that acts in excess of the authority conferred are null and void, it provides the means deemed sufficient to keep the corporation within the limitations of the law.

The 53d section of the act, sec. 5239 R. S. denounces a forfeiture of all privileges, &c., for the violation of any of its provisions, and charges with a personal liability those directors who have participated therein.

However this may be, we submit that the case in hand is clear of any difficulty upon the question of power under the act, and that the judgment below should be reversed.

P. PHILLIPS,
BRITTON A. HILL,
For Plaintiff in Error.

Supreme Court of the United States.

No. 128.

THE UNION NATIONAL BANK OF ST. LOUIS, *et al.*,

Plaintiff in Error.

vs.

ELIZABETH A. MATTHEWS,

Defendant in Error.

IN ERROR TO SUPREME COURT OF THE STATE OF MISSOURI.

ARGUMENT FOR DEFENDANT IN ERROR.

NOBLE & ORRICK,

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 128.

THE UNION NATIONAL BANK OF ST. LOUIS, *et al.*,
Plaintiff in Error.

vs.

ELIZABETH A. MATTHEWS,
Defendant in Error.

IN ERROR TO SUPREME COURT OF THE STATE OF MISSOURI.

This action was commenced in the Circuit Court of St. Louis County at its April Term, 1874, on petition by Elizabeth A. Matthews against Thomas K. Skinker, the Union National Bank, *et al.*, defendants, for an injunction to restrain the sale of certain real estate under a deed of trust given, in form usual in Missouri, as security for the payment of money. An interlocutory order having been issued restraining the sale, the defendants Davis, assignee, and Skinker, trustee, answered, denying any individual interest in the subject matter, and the cause was subsequently dismissed as to the assignee, Davis.

On the 24th of March, 1874, the Union National Bank answered under oath, and on the 20th of April, 1874, plaintiff's reply was filed. On the 18th of May, at the April Term

of the St. Louis Circuit Court, the plaintiff moved for judgment on the pleadings, which motion was sustained, and the injunction, forbidding the sale, was made perpetual against the Union National Bank of St. Louis, and Skinker, trustee. At the time this motion was sustained the suit was dismissed as to Davis, assignee of Celsus Price, and William M. Ladd, members of firm of Sterling Price & Co., and an exception taken by the Union National Bank, which was preserved. On the 8th of June, 1874, a motion for re-hearing was overruled. This motion was based on the following reasons (see printed transcript, page 12):

1st. Because on the pleadings the plaintiff was not entitled to a perpetual injunction, and the injunction should have been dissolved.

2d. Because the court erred in holding the deed of trust to be within the perview of the National Banking Act, or that the same was given to the bank to secure future advances.

3d. Because the court erred in permitting the suit to be dismissed against the other defendant.

4th. Because plaintiff was estopped from denying the validity of the note and deed, that the note and deed were made to Sterling Price & Co.'s trustee for their security, and not for the security of the bank, until Price & Co. delivered it to the bank as collateral security, and because the bank acquired no title to the deed of trust and note as collateral security until the note discounted for them by the bank became due.

To the action of the court in overruling the motion for a re-hearing exception was made and preserved, and an appeal taken to the general term of the St. Louis Circuit Court. The judgment was affirmed in general term and an appeal granted to the Supreme Court of the State of Missouri. In the Supreme Court of the State, at the January Term, 1876, February 1st, the judgment of the court below was affirmed. An opinion was filed, the same having been rendered by Judge Wagner, which may be found on pages 13, 14, 15 and 16 of the printed transcript.

In the assignment of errors in the Supreme Court the only one upon which the Supreme Court could have acted, was, that the judgment below was rendered in favor of the plaintiff when it should have been rendered for the defendants, appellants. The other points do not seem to have been pertinent.

On this record the case is now here.

In the *Petition* the plaintiff stated in substance as follows: That the Union National Bank of St. Louis was a corporation under the laws of the United States. That on the 1st of March, 1871, the plaintiff, Mrs. Matthews, and one Logan, executed and delivered their joint and several note payable to the order of Sterling Price & Co., composed of Price and Ladd, for the sum of fifteen thousand (15,000) dollars, at two (2) years, with ten (10) per cent. interest. That although plaintiff appeared as a maker, she was, in truth, only a surety for Logan, all of which Sterling Price & Co., and the bank well knew at the time the note was signed and executed. That to secure the payment of the note, the plaintiff executed her deed of trust of even date with the note, duly recorded, upon certain real estate, in the petition described, situated in the State of Missouri. That Isaac J. Pollard, vice-president of the bank, was one of the trustees named in the deed of trust, and Thomas K. Skinker, the defendant, was also named as a trustee. That the note was due and held by the bank, and the bank had requested Skinker, as surviving trustee, to execute the deed, by selling the land to pay the note. That the trustee, Skinker, had advertised, according to the terms of the deed, and proposed to sell the property on the 12th of February, 1874. The plaintiff stated further that she was induced to execute the note by the following considerations: that Mr. Logan was a friend and neighbor of hers, and desirous of embarking in business, but was without means or credit sufficient; that Sterling Price & Co. were engaged in business in St. Louis, and represented to the plaintiff, Mrs. Matthews, and Logan, that they desired a partner, and would receive Logan if he would pay the firm the sum of fifteen thousand (15,000) dollars, or if the plaintiff would execute

her note with Logan, secured by the deed of trust aforesaid, to the amount stated, and that Price & Co., previous to the execution of the note, and as inducement thereto, made certain representations, set forth in the petition, which were false, and known so to be by Price & Co., and on which plaintiff relied, and by which she was induced to make the note and deed of trust; that after Price & Co. obtained the note they refused to give Logan an interest as partner, and that the members of the firm agreed to return to plaintiff the note and deed of trust, but had failed so to do. Plaintiff stated further that after the note and deed of trust were thus procured from her, Celsus Price, by consent of Price & Co., indorsed said note, and he then being a director and member of the discount board of the Union National Bank, defendant, and Pollard, one of the trustees in the deed of trust, being vice-president of the Union National Bank; that said trustee, Pollard, and other officers and agents in charge of the management of the bank well knowing the circumstances under which the note and deed of trust were procured, and the inducements and considerations for which they were executed by the plaintiff, did, nevertheless, accept said note and deed of trust as collateral security for certain indebtedness of said Sterling Price & Co. to said bank; that the bank was holder of the note, and the party requesting Mr. Skinker, the trustee, to foreclose the deed of trust. The plaintiff further stated that the indebtedness of Sterling Price & Co. to the bank, for which the bank held the note as collateral, was created after the maturity of said note, as plaintiff was informed and believes, and that Price and Ladd, of the firm of Price & Co., in creating the debt to the bank, did not advise or consult with Logan; that he received no portion of the money borrowed from the bank, and did not join Price & Co. in signing any note or other obligation of the bank for such moneys and indebtedness; that the Union National Bank had notice at the date of the execution of the note, and at the time of the delivery thereof to it, of the nature of the inducements and considerations for which the same was executed; that Price & Co. were insolvent; that

the real estate was worth more than the debt; that the deed of trust was a cloud on the title; that the plaintiff was not indebted on account of the note, and the same was fraudulent and void.

The prayer of the bill was for injunction against Skinker, trustee of the Union National Bank, and all the defendants from selling or attempting to sell the real estate, and that the note and deed of trust should be declared void and of no effect, and that it should be given up and canceled. This petition was sworn to by the plaintiff in due form.

The *answer* of the bank by Hill & Bowman, its attorneys, denied that the plaintiff was only surety on the note for Logan; denied that the plaintiff received no consideration for the note; denied that the Union National Bank, or its officers or agents knew whether the note was executed as stated, and averred that the note was secured by deed of trust and presented at the bank in regular course of business as collateral security for money to be advanced to Sterling Price & Co., and on the 14th day of March, 1871, in the regular course of business, the money was advanced to Sterling Price & Co., which money was so advanced by the bank upon said note as collateral security, and had never been repaid to the bank by the plaintiff or any one. The answer went on to say, that prior to the 14th of March, 1871, neither the bank nor any of its officers, or agents had any knowledge or information sufficient to form a belief of any of the alleged considerations stated in plaintiff's petition; and proceeded to deny severally the numerous other allegations of the bill. Among the rest, to be noted, it was denied that Price, as director or member of the discount board, or Pollard, as vice-president of the bank, or trustee in the deed of trust, knew anything of the circumstances alleged in the petition. The answer then *specifically stated* (see page 9, printed transcript, middle of the page). "This defendant avers that it accepted said note and deed of trust on the 14th of March, 1871, *as security for the sum of $15,000, then and there advanced and loaned to said Sterling Price & Co. at said bank in the city of St. Louis on the security of said note and*

deed of trust, without any knowledge of any of the circumstances or facts concerning the same, as stated in the plaintiff's petition; and the said Sterling Price & Co., upon said note and deed of trust, made on the 14th of March, 1871, has never been paid by said Price & Co. to said bank or any other person." And the defendant denied further, that the indebtedness of Price & Co. to the bank was created after the maturity of the note, and averred that the sum of money advanced upon said note and deed of trust was advanced on the 14th of March, 1871, and there has never been any money advanced thereon to said Price & Co., or any other person, since that date, nor has the same or any part thereof ever been paid. The answer asked that the injunction might be dissolved.

This answer, signed by the attorneys of the Union National Bank of St. Louis, was sworn to on the 21st of March, 1874, by William Shields, cashier of the bank.

The reply denied that the note and deed of trust in the answer was presented to the bank as collateral security for money to be advanced to Sterling Price & Co., in regular course of business, as alleged; denied that on the 14th of March, 1871, said money was so advanced to Sterling Price & Co., in the regular course of business, as alleged, but stated the acceptance of said note and deed of trust by the bank was out of the regular course of business of the bank. These were the pleadings.

It is to be observed that the averment in the answer is unqualified in the only particulars material to the question of power, in this court, alone to be considered that; (see page 9, printed record) the note and deed of trust, on the 14th of March, 1871, were accepted by the bank as security for the sum of $15,000, *then and there* advanced and loaned to Sterling Price & Co. by said bank, in the city of St. Louis, at said bank, *on the security of said note and deed of trust;* that said advance to said Sterling Price & Co., upon said note and deed of trust, made on the 14th day of March, 1871, had never been paid by said Price & Co. to said bank, or any other person. The defendant then reiterated, in the same connec-

tion, that the indebtedness of Sterling Price & Co. to the bank was not created after the maturity of the note and that the money was advanced upon the note and deed of trust, on the 14th of March, 1871, and that there had never been any money advanced thereon to Price & Co., or any other persons, since that date, and that the same had not been paid.

This, it will be observed, was in response to and to avoid the averment of the bill to the following effect (see page 4, *foot*): That the defendant accepted said note and deed of trust as collateral security for a certain indebtedness of Sterling Price & Co., and that the indebtedness of Sterling Price & Co. was created after the maturity of the note. It is this averment that the answer denies, and avers that the money was loaned on the security of the note and deed of trust. There is no other averment in the pleadings explaining or varying this alleged origin of this indebtedness; showing the existence of any other security, or any other note held by the bank, than the note of Mrs. Matthews, secured by this deed of trust.

ARGUMENT.

The pleadings in this case were made without any reference to those provisions of the "National Banking Act," now to be considered; there is nothing in the Petition, the Answer, or the Reply, that bases any portion of the relief sought, or the defense asserted, expressly upon the question of the power of a national bank to loan money on real estate security.

The petition asserted a cause of action, because the note secured by the deed of trust had been obtained from the plaintiff by false and fraudulent representations, by which the bank was bound, because it had received the note with actual notice, also out of the ordinary course of business, *for a past consideration*, and therefore subject to the equities affecting the consideration. The defendant, for an answer to these averments affecting it, denied actual notice, and affirmatively asserted that the money loaned was advanced by the bank in the first

instance on the security of the note and the deed of trust, and in the usual course of business.

The case coming on for hearing, plaintiff moved on the pleadings for judgment, and the State court of original jurisdiction thereupon decreed the injunction, against enforcing the deed of trust, should be made perpetual.

The petition for a review makes some suggestions that the National Banking Act had been discussed in its application to this case.

First. We will admit for the purposes of this argument this statute had much to do with the action of the court of original jurisdiction, and that it unquestionably had controlling power in the Supreme Court of the State. Yet were this Honorable Court acting under its unbroken line of decisions prior to the act of Congress of February 14, 1867, and refusing to look into the opinion of the State court as a part of the record, we submit it could find nothing presented to this Court to justify a review by it of the action of the court below; and we now object to the jurisdiction of this Honorable Court, and move that this case may be dismissed for want of jurisdiction.

We submit it may be well maintained here that this Court will not look to the opinion of the court below *solely* to find jurisdiction on the Federal question, even under the act of 1867; and we have a right to insist in this case, that there appearing of record no judgment based absolutely and obviously upon the Federal question, this Court will not review the action of the State court in any particular. A justification, if any is needed, for this position, as well as a decision, celebrated in Missouri on the point, may be found in

Gibson *vs.* Chouteau, 8 Wallace R. 317.

Nor do we understand that even under the act of 1867, this Court has determined it will rely solely upon the opinion delivered below as a basis of its action.

Murdoch *vs.* Memphis, 20 Wall. R. 333.
Moore *vs.* Mississippi, 21 Wall. R. 636.
Railroad Co. *vs.* Maryland, 21 Wall. R. 457.

If these authorities and the present judgment and practice of this Honorable Court entitle us to a dismissal of this cause for the want of jurisdiction, we make the point, and claim the benefit of it.

Second. But if we lose the point of jurisdiction, we at least may gain another position, which is, that there being nothing in any other portion of the record to show conclusively that the action of the court below was based solely on the Federal question, then the opinion of the State Supreme Court should be taken in its statement of what the case was on the pleadings. The effect of these, as to the issue made, that court would be deemed here competent to decide. This Honorable Court would not undertake to review the opinion and determination of the State courts as to what the case made really is, when it has to take that opinion as the only evidence of jurisdiction here at all. Upon a question of pleading, purely local under the code of civil practice, depending upon the statutes of the State as its source, and the decisions of the Supreme Court of the State for its interpretation, this Court would not be inclined to hold that the case presented, in any particular instance, was in fact different from that which the Supreme Court of the State had, on a view of the whole matter, determined it to be. If we are correct in this, the case is simply and solely, as announced by the Supreme Court in its opinion, as follows (see transcript, pages 13, 14; Missouri Reports, vol. 62, p. 330.)

"From the record it appears that the plaintiff executed her note, payable to Sterling Price & Co., for $15,000, due two years after date, and to secure the payment of the note she made a deed of trust, bearing even date with the note, on certain real estate belonging to her. The note and deed of trust were delivered to Sterling Price & Co., but afterwards transferred to the Union National Bank of St. Louis, a banking institution organized under the act of Congress, to secure a loan for $15,000 advanced to Price & Co. by the bank. Price & Co. having failed to pay the money *advanced on the note* and *secured by the deed of trust*, the trustee, at the request

of the bank, advertised the property for sale, and the plaintiff filed her petition to enjoin the trustee and the bank from proceeding with the sale."

This is the case as stated by the court below, and we suppose will be taken as the actual facts stated and admitted by the pleadings. But if this Court will look into the pleadings, we assert the case will be found at least as strong for the defendant in error here as the opinion states it.

If this Court construes the answer of the defendant, it can, we submit, form no conclusion more favorable to the bank than is stated above. The answer states (page 9, middle):

"This defendant avers that it accepted said note and deed of trust on the 14th of March, 1871, as security for the sum of $15,000, then and there advanced and loaned to said Sterling Price & Co., at said bank in the city of St. Louis, on the security of said note and deed of trust, without any knowledge of any of the circumstances or facts concerning the same, as stated in the plaintiff's petition."

No matter, in this Honorable Court, if the bill did state the contrary, nor that the reply again denied any one of the assertions of the answer. To say that because of this state of pleading, the State court of original jurisdiction erred, would be deciding not a Federal but a purely local question, peculiarly within the control of the Supreme State judicial tribunal, and which it has decided otherwise.

Third. The only proposition, if this Court has jurisdiction, to determine is, we submit, "*Can a national bank enforce a deed of trust on real estate, taken by it as security, with the note therein described, for a sum of money, at the time of the delivery of the note and deed loaned, on them?*"

I.—*The Statute and its Violation.*

This case is unqualified by the intervention of any other note than the one described in the deed of trust; there is no averment anywhere that there was any other such note made;

there is no averment or fact stated that there was any other evidence of the loan than the deed of trust and the note described in it; the loan was made to Sterling Price & Co. on the security of this note and this deed of trust; so says the record, and so says the opinion of the court below. If this deed of trust may be enforced, then, as we submit, the Court will decide necessarily that there is no deed of trust for a loan of money that may be taken by a national bank that can not be enforced; that there is no provision in the National Banking Act which prohibits the acceptance by a national bank for an original loan made by it, a deed of trust on real estate as security at the inception of the loan. This case is as strong against the security as any case can be, in which this question can arise.

We maintain that the deed of trust as a security was *ultra vires*, illegal, and void.

The powers of a bank upon its organization may be found now as they existed at the time of this transaction, in Section 5136 of the Revised Statutes: * * *

"7th. To exercise by its board of directors, or duly authorized officers, or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, bullion; by loaning money on *personal security*, and by obtaining, issuing, and circulating notes according to the provisions of this statute."

Immediately following this is Section 5137, as follows:

"A national banking association may purchase, hold, and convey real estate for the following purposes and for no others:

"1. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"2. Such as shall be mortaged to it in good faith by way of security for debts *previously contracted*.

"3. Such as shall be conveyed to it in consideration of debts previously contracted in the course of its dealings.

"4. Such as it shall purchase at sales and under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it; but no such association shall hold the possession of any real estate under mortgage, or a title or possession of any real estate, purchased to secure any debts due to it, for a longer period than five years."

We are to consider, in approaching the construction of this act, first, the source of power for the creation of these banks.

It is not a power expressly granted to Congress by the Constitution; it is from the exercise of an implied power, which, as much as any other, has incurred the determined opposition of a great portion of our citizens. It would be an unnecessary labor to dwell upon this fact in our national and judicial history; suffice it to say, that upon it we base, with quite as much confidence as we could in any case, the assertion of those rules of construction, applicable to all grants of corporate power, among which the most prominent are:

1. Acts of incorporation are to be construed favorably to the public at large and most strongly against the corporators.
2. A corporation has no power except what is given by its incorporating act, other than is necessary or incidental to its existence or its express powers.
3. The specification of certain powers is an implied prohibition of the exercise of other and distinct powers.
4. The intention of the law-maker is to guide us, and we are to arrive at that intention from the whole statute.

We forbear presenting the authorities on these propositions here, as they are collated in those opinions of the Supreme Courts of the different States where the main question has been already decided, and to which we shall soon refer. With these rules of construction, and the provisions of the National Banking Act before us, we submit that the conclusion is irresistible, that it was the will of Congress that no National Bank should loan money on real estate security; that it should

loan money as an original transaction on personal security only; but that, if after having loaned on such security, made in good faith, it found a mortgage on real estate necessary for the security of such debt or contract, it would be lawful to receive such mortgage.

Where the statute says a bank may loan money on personal security there is an implied prohibition that it should loan it on no other: "*Expressio unius est exclusio alterius.*"

Did the statute contain nothing else than this, we think we might safely say it would not be lawful for such bank to loan money on real estate security. But the law goes further; it enumerates the real estate a bank may hold, and in this regard, says it may hold such as may be mortgaged to it in *good faith* by way of security of debts *previously contracted*. We have here again a prohibition, under the same rule of construction we have just referred to. Such bank may loan upon mortgage of real estate for debts previously contracted, not for a debt, at the time that the mortgage is received, first contracted, as is the case here. We also call attention to the use of the words, "*in good faith.*" This expression shows that the mind of the legislator was turned to the possibility of an evasion of the law by a loan possibly upon personal security in the first instance, with the understanding at the time that real estate security should be given soon thereafter. Therefore, the statute aims at the good faith of the whole transaction, even where the mortgage is to secure a debt, *in form*, previously contracted.

In the present instance there was a direct violation of this law; the money loaned was advanced on the security of real estate. The answer unequivocally and persistently asserts but for the real estate security the loan would not have been made originally; this is the legal effect of what the answer says. The pleader was endeavoring to avoid the charge of fraud and its effect upon the bank, because the bank had taken the security as alleged for a debt previously contracted. To avoid the equities between the original parties, the holder of the paper was vigorous in its assertion that it was not

for a past consideration the security was taken, but for a loan then and there made upon the deed of trust itself. The bank, in its struggle to avoid the charge of fraud, in fact perpetrated upon the maker of the note, persistently asserts facts that show, upon the oath of its Cashier, that it had perpetrated a fraud upon its own charter.

This particular bank is entitled to no favorable consideration. It seems to have managed this real estate security from the beginning. The vice-president of the bank was one of the trustees in the deed of trust. It is morally certain from undisputed incidental matters that the loan was intended to be made by the bank upon the real estate security even before the deed of trust was written. And this brings us to the consideration of what must be the effect upon this security of this violation by a bank of its organic law.

II.—*The Effect of Violation of the Statute.*

It is to be observed that this is not an action for the recovery of money; it does not fall within that line of decisions which have held it possible for a bank that has loaned money on an agreement that was *ultra vires*, to nevertheless recover it back from the party enjoying the benefit of the agreement. The proceeding of the bank in this instance which the court below restrained, was to enforce the security. But we may say, in this connection, we should not hesitate to maintain the proposition broadly, did the case require it, that the whole transaction was not only *ultra vires*, but absolutely illegal; that the loan was prohibited, and that all incidental transactions were affected by it. We think we have good authority for this proposition in the opinions of this Honorable Court to the effect that a collateral contract made under one tainted with illegality can not be enforced.

Armstrong *vs.* Toler, U. S. S. C. 11 Wheaton, 258.
McBlair *vs.* Gibbs, U. S. S. C. 17 How. R. 232.

But it is proper for us at this time, probably, to assert no more than our case requires, and that is, that the deed of trust having been taken by the bank in direct violation of its charter, is void, and that a perpetual injunction against it was properly granted.

The spirit of the act which we have been considering unquestionably is to prohibit national banks from willingly investing, or allowing their funds to become invested, in real estate. The statesmen who framed the act, which at the time of its passage was deemed necessary to the country's safety, were not willing to leave the success of the system to the judgment or guidance in all particulars of the officers of the several institutions as they arose. They embodied in the act the experience of the past. The provisions of other banking systems were embodied or excluded as wisdom here dictated. The National Banking Act is a transcript, in many portions, of the banking act of New York of 1838; but where the latter allows loans on real estate security, the National Act, *ex industriâ*, is changed. (Crocker *vs.* Whitney Thompson's National Bank Cases, 749.) Nothing was more obvious than that a peculiar danger would beset these banks if their funds might become involved in real estate. This security, in this country more than any other, is dangerous for many reasons; it is abundant, and apt to be offered by many urgent borrowers with fair show of its intrinsic worth; in the hands of a corporation, where it has had to realize on the security, it is expensive, because of the outlays it requires; it is not available to meet the daily demands of the creditors of the bank itself; and it is subject to great fluctuations in market value. It would not only be against the express letter of the law, but against the spirit of the act, and public policy, to allow a transaction, so obviously illegal as the present one, to stand. Its effect upon the whole system would be to nullify the will of its creator, and to substitute in its place that of the creature.

In Missouri we have a line of decisions in regard to the

illegality of contracts made by banks in violation of their charters that extends back to the earliest of our reports.

Commonwealth Bank *vs.* Clark, 4 Mo. R. 59.
Griffith *vs.* Commonwealth Bank, 4 Mo. R. 255.
Bank of Lawrence *vs.* Young, 37 Mo. R. 398.

We cite also, on the subject of illegality:

White *vs.* Franklin Bank, 22 Pick. R. 181.
Downing *vs.* Ringer, 7 Mo. R. 585.
Brown *vs.* Farkington, 3 Wall. R. 381.

"When a contract is prohibited, whether expressly or by implication, it is illegal and can not be enforced."

Beasley *vs.* Bignold, 5 B. & Ald. 335.
Forster *vs.* Taylor, 5 B. & Ald. 887.
Cope *vs.* Rowlands, 2 M. & W. 149.

"A fraud on the statute is a violation of the statute."

Bank, &c., *vs.* Owens, 2 Peters, 535.

"Objection of illegality is not allowed for benefit of parties, but for public good."

Canal Co. *vs.* Vilette, 21 How. R. 414.
Coppill *vs.* Hall, 7 Wall. R. 558.
Angell & Ames on Corps., secs. 264–5.

The opinion of the Supreme Court of Missouri in the case here under consideration is based upon the case, in large part, of Fowler *vs.* Scully, 72 Pa. 456. The case of Fowler *vs.* Scully will be found to be not only a case strongly in point as a precedent for the opinion of the Supreme Court of Missouri, but one full of learning and exact citation of authorities. It has been followed in the same State in the case of Woods against People's National Bank of Pittsburg, 83 Pa. 57, and the same general doctrine established by this case is held in the following cases:

Merchants National Bank *vs.* Mears (Northern District of Illinois). Thompson's National Bank Cases, p. 353. 10th Chicago Legal News, 180.

Kansas Valley National Bank *vs.* Rowell, 2 Dillon, 371.
Crocker *vs.* Whitney, N. Y. R. Thompson's National Bank Cases, p. 745.
Ripley *vs.* Harris, 3 Bissell (Cir. Ct. R. 190).

We have found but one case in this Honorable Court touching upon the question here presented, and that only incidentally, but which case decides, we think, that national banks can not do what natural persons can do under like circumstances, either as to real estate or as to its own stock; the court holding that while dealing in stocks is not expressly prohibited, that such prohibition is implied from the failure to grant the power; and we think with like force deciding a like prohibition as to mortgages on real estate.

First National Bank *vs.* National Exchange Bank, 92 U. S. R. (2 Otto), 127–8,

A case that is sometimes cited against the position here maintained, is that of the First National Bank *vs.* Haire, 36 Iowa, 443; but this opinion, if it were adopted by this Honorable Court, could not affect the case we here present. The opinion itself is open to objection, and is far more liberal in the interpretation of the charters of national banks than the eminent courts of Missouri, Pennsylvania and New York have been upon the same subject; but broad as it is, it is limited in its own expression as follows:

"Every loan or discount by a bank is made in good faith, in reliance by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken by the bank, or directly to its *use*, the case is not within the statute."

It is impossible for any one to maintain in the present case that the mortgage was not taken directly for the use of the bank, for it was the security, as the answer avers, upon which the loan was made.

It may be well in this connection to say that in Missouri, where this deed of trust was taken, such a conveyance is in

effect a mortgage; that although a third person is named as trustee and is vested with a power to sell, yet there is an equity of redemption remaining in the grantor which may be foreclosed by a proceeding in court the same as any other mortgage, and all beneficial interest in the estate passes by the transfer of the note secured by the deed of trust. The deed of trust is merely auxiliary to the note, and whoever is the holder of the note becomes entitled to the security. When, as in the present instance, the note was endorsed to the bank and the loan was made originally thereon, it was in law as well as in fact, as the answer says, expressly made upon the security of the deed of trust.

Potter *vs.* Stevens, 40 Mo. R. 229.
Chappell *vs.* Allen, 38 Mo. R. 213.
Kennett *vs.* Plummer, 28 Mo. R. 142.

We conclude, therefore, in this matter, that either this Honorable Court will refuse to take jurisdiction of the Federal question attempted to be raised herein, or if it does, it will look to the opinion of the court below for an interpretation of the case, and upon that case, as shown by the pleadings interpreted by the Supreme Court of the State, it will find that it is a case clearly of a loan originally made upon real estate security, by way of mortgage, taken at the inception of the loan by the bank, and as such was received in direct violation of the charter, which prohibited such security, and was, therefore, not only *ultra vires*, but absolutely illegal, and that the decree of the State court granting a perpetual injunction against an enforcement of the mortgage is well supported by authority and reason, and should be affirmed.

NOBLE & ORRICK,

Attorneys for Defendant in Error.

March 9. 79. Rec'd

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK AND OTHERS,

Plaintiff in Error,

vs.

ELIZABETH MATTHEWS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

PETITION FOR MODIFICATION OF JUDGMENT HEREIN.

Now comes the defendant in error in the above entitled cause, and respectfully moves the court to modify the judgment herein so far as it instructs the Supreme Court of Missouri to dismiss the bill in said cause.

There is a main question of fraud at issue, which the Supreme Court of Missouri may allow to be heard and determined.

An inspection of the record shows that nothing was before this Honorable Court, but the bare question of the right of the Bank to take the security, the enforcement of

which was enjoined below. The whole purpose of this Court in such case, on error only, we submit, should be deemed accomplished when the law is declared.

It is possible to control the whole case, and thus order the bill to be dismissed, only by taking this writ of error as as equivalent to an appeal in equity; but there is no necessity to do so, and this action of this Court is more severe on the defendant in error than it should be.

We urge that the State Supreme Court, in a case involving a question separate from the Federal question, may yet hold, as a matter of State pleading and practice, that the injunction is maintainable on the case of fraud, not sufficiently avoided by answer as replied to; or it may be its judgment, that the case shall be reversed and sent down for hearing on the issues remaining, for any reasons that be yet presented to it, sufficient in its opinion to warrant such action, aside from the Federal question, now to be taken as of course, determined.

For this Court to instruct to the contrary is to go beyond the necessities of the case, and force a Supreme Court of the State on matters peculiarly within its province. The judiciary act does not require this Honorable Court to give a final decision in this case.

We claim the right for our client, as a citizen of Missouri, to obtain from her State tribunal all relief this Honorable Court is not compelled to refuse her in its decision against her *on a new question*. It is a severe penalty to decide a case on a point new in the courts, and when State tribunals have held to the contrary, so as to refuse or prevent the trial of any other question involved in the case, and cut the defendant in error off from any indulgence in the State tribunal upon other questions not Federal in their nature.

The defendant in error, we submit, had good reason to rely upon the opinions of the Supreme Courts of Pennsyl-

vania, New York, and Missouri, apparently in her favor, and so should be relieved from any unusual severity in the decision of this Court, in the particular of ordering a dismissal.

It is apparent that the case brought here was made with great confidence that the Federal question would be decided in favor of the defendant in error, because of the current of decision existing. If the State Court may choose to allow the other questions in the case to be opened in the court of original jurisdiction, we ask this Court not to forbid it by its instruction to dismiss the bill.

NOBLE & ORRICK,

Att'ys for Def't in Error.

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK

vs.

ELIZABETH MATTHEWS.

Brief of P. Phillips, in reply to motion to amend the judgment.

The application to amend the judgment rendered in this case ought not to be granted.

The petition of Mrs. Matthews, in the court below, charged that Price & Co. had made fraudulent representations to induce her to execute the note. It also averred that the bank had notice of these fraudulent representations.

The answer of the bank is very full, and in the most ample manner denies all knowledge of the circumstances which induced the execution of the note.

Skinker, the trustee in the deed, and Davis, the assignee of Price & Co., averred to be insolvents, were also made parties to the proceedings, and they filed answers denying all knowledge of the transaction, and calling for proof.

8 Otto 621
Oct 3. 1878

March 8. 79. Rec'd

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK AND OTHERS,

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vs.

ELIZABETH MATTHEWS,

Defendant in Error.

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NOBLE & ORRICK,

Att'ys for Def't in Error.

March 6. 79.

Judge Swayne

8 Otto 1-621
Oct 7. 1878

Supreme Court of the United States.

NO. 128.

UNION NATIONAL BANK

vs.

ELIZABETH MATTHEWS.

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The answer of the bank is very full, and in the most ample manner denies all knowledge of the circumstances which induced the execution of the note.

Skinker, the trustee in the deed, and Davis, the assignee of Price & Co., averred to be insolvents, were also made parties to the proceedings, and they filed answers denying all knowledge of the transaction, and calling for proof.

These answers were filed on the 21 and 24 March, 1874, and on 28 April the complainant filed a "reply" to the answer of the bank. No notice whatever is taken of the answers of Skinker and Davis, the assignee.

That reply is confined to a denial that the bank received the note in the regular course of business; and the reply thus concludes: "*And having fully replied, plaintiff prays for judgment*" (p. 10).

It is thus seen that the question of fraud was entirely abandoned.

Following this we have the entry:

"Now come the parties, by their respective attorneys, and the plaintiff moves for judgment on the pleadings herein, which being heard and fully considered is sustained."

Thereupon, on motion of plaintiff by attorney, it is ordered by the court that *the cause be dismissed, as to the defendant, George G. Davis, assignee of Sterling Price and Wm. M. Ladd.*

The decree perpetuates the injunction against Skinker and the bank restraining them from proceeding under the deed of trust.

The dismissal of Davis, who represented the parties charged with the fraud which induced the execution of the note, freed the case from any question raised by the complainant as to the fraud, as completely as if the complaint itself had been *amended by striking out all allegations as to fraud.*

When the case was carried to the Supreme Court of the State, there was nothing to be considered there

but the question whether the bank had exceeded its power in discounting the note. The court held that the bank had exceeded its powers; and thereupon the judgment of the court was affirmed.

What that judgment was we have already stated, to wit: a judgment *on motion of plaintiff* dismissing the cause as to Davis, assignee of Price & Co., and perpetually enjoining Skinker and the bank.

The judgment of the Supreme Court affirming the judgment below was brought to this court by writ of error.

The controversy here was as to the power of the bank. This court upheld the power and reversed the judgment, with direction to dismiss the petition.

We insist this was a correct judgment, as nothing was involved in the controversy but the power of the bank. The only proper judgment was the one rendered, to wit: the direction to dismiss the petition.

P. PHILLIPS.